Supreme Court, U.S.
FILED
OCT 31 1996
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No. 96-391

In The
Supreme Court of the United States
October Term, 1996

OLLIE DAILEY,
Petitioner,

VS.

LTV AEROSPACE AND DEFENSE COMPANY,
Respondent.

OLLIE DAILEY,
Petitioner,

VS.

VOUGHT AIRCRAFT COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY TO OPPOSITION TO PETITION

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REPLY BRIEF TO OPPOSITION TO PETITION

COUNTER STATEMENT OF THE FACTS

1. Dailey has never alleged he filed a charge of disability discrimination with the EEOC after he was not returned to work in October of 1990 as alleged by Respondent. Opposition to Petition at 9. Dailey has argued that he was being discriminated against and retaliated against because of his race and for his having engaged in protected activities, and that his disability or lifting restrictions, were being used as an excuse or pretext for that discrimination.

2. It is true Dailey did not complain about the campaign literature which had been defaced with the word "nigger" until four months after they were discovered. However, during trial Dailey specifically testified that he had taken this campaign literature along with some newly defaced literature which contained derogatory comments, although not racist comments, with him when he went to talk to Mr. Skinner. Dailey specifically testified that it was during this meeting with Mr. Skinner over these issues when he made the wholly inappropriate and out of context comments about interracial marriages. None of these facts was ever disputed.

3. The District Court did try to limit the case to two days, and acknowledged this fact as set out in the transcript (*Dailey I*, T. V. 1, p. 97) when informing the parties he would no longer restrict them in such a manner. Dailey has appealed the validity of the District Court's rulings and argued they are contrary to clear law and were intended to prevent him from reaching a jury. Any evidence which would tend to support his claims that the District Court violated the law and abused its discretion should be relevant to this Court's consideration of the issues on appeal.

4. Dailey and his counsel both contend there were statements made by the District Court during trial which were on the record and which did not appear in the transcript, so to the extent Respondent argues that there is no evidence in the record the District Court implied Dailey was being

"greedy" in his negotiations and threatened him with years of appeals if he did not settle his case, the Respondent is technically correct. However, it should be noted Respondent does not dispute the District Court suggested Dailey might be "greedy" when trying to convince him to settle his case and that this statement for some reason is not in the transcript.[1] As for the remaining statements about it being better to settle then face years of appeals, Dailey and his counsel continue to claim statements to this effect were made on the record in open court, should have been in the transcript and are indicative of bias on the part of the District Court.

5. It is true there is no evidence in the record that $100,000.00 offer was made by Respondent in this case during trial, except for the Respondent's failure to deny the fact in its Brief in Opposition. This fact is not being included by Dailey to prove liability for or invalidity of the claim or its amount. These would be the only circumstances under which this information would not be admissible under Rule 408 of the Federal Rules of Civil Procedure. If the information about negotiations is being offered for another purpose it can be admissible. Rule 408. The amount offered during trial is being presented by Dailey to put the District Court's comments about Dailey being greedy in full context and in defense of the claim that Dailey and his counsel have acted in bad faith at any time during the course of these proceedings. It is argued that $100,000.00 offers are not regularly made in the middle of trial in a case which is frivolous and brought in bad faith as Dailey has been accused of doing.

6. Contrary to Respondent's denial, the District Court very clearly found that Dailey's Title VII layoff claims brought in *Dailey II* were duplicative of the claims asserted in

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1 Dailey and his counsel have been unable to obtain any cooperation from the court reporter involved and have been forced to file a formal complaint against her with the Texas Board of Certification in order to find out what happened and why. Said complaint is pending.

Dailey I. Petition at 21a-22a. The District Court also found in its order granting sanctions that "there is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from any evidence submitted in those claims in *Dailey I*" which it had decided did not prove discrimination. Petition at 27a. Dailey had argued in defense of Respondent's motion for sanctions that he had relied on the same facts presented at trial during *Dailey I* as support for his layoff claims, as well as, the timing between the Department of Labor's order to Respondent that it had to return him to work and the decision to lay him and a few other machinists off. Dailey also relied on the fact that the decision to have the layoff was made by no other then Mr. Skinner. Dailey argued that if a jury believed he had been initially kept off work because of his race and in retaliation for his having engaged in protected activities back in 1990 then they could conclude from that, and the timing between the decision to lay him off and the Department of Labor's order to put him back to work, that the layoff was timed simply as a means to continue avoiding having to put him back to work and that it was motivated by the same discriminatory and retaliatory motives fueling the original October, 1990 refusal to return him to work. Additionally, evidence was produced to the District Court in the form of a letter wherein the Department of Labor references a meeting held with Respondent on May 20, 1993, the same day as the decision to lay Dailey off, during which time Respondent was informed that it must return Dailey to work, make him whole, and that it had no right to appeal. (*Dailey II*, R. Vol. 2, p. 282).

ARGUMENT

A. THE DISTRICT COURT DEPRIVED DAILEY OF A CONSTITUTIONAL RIGHT TO A JURY TRIAL BY ERRONEOUSLY SPLITTING HIS LEGAL AND EQUITABLE CLAIMS.

1. The October, 1992 Title VII Claim.

Dailey does not argue that he should be allowed to continue asserting new and different causes of action up to the time of trial at his whim as argued by Respondent. Dailey has argued, however, simply that his claims of race discrimination and retaliation over the Respondent's second refusal to return him to work in October, 1992 should not have been dismissed on the sole ground that these claims were not first raised in a timely EEOC charge. When Dailey first joined this claim he already had pending before the District Court in *Dailey I* his claim of a pattern and practice of race discrimination and retaliation culminating in Respondent's refusal to return him to work in October, 1990. The October, 1992 incident was alleged to have been a newly repeated identical act of discrimination and retaliation within this continuing pattern, as well as, retaliation over the previously filed EEOC charges and the litigation already pending before the District Court. This charge was not new and different.

Events arising after the original EEOC charge filing can be sued upon despite their not being included in the original charge if they are construed as events in the course of a continuing violation encompassed by the original charge. *Silver v. Mohasco Corp.* 602 F.2d 1083, 1090 (2nd Cir. 1979), *reversed on other grounds*, 447 U.S. 807, 65 L.Ed.2d 532, 100 S.Ct. 2486; *see also Brown v. Hartshorne Public School Dist. No. 1,* 864 F.2d 680, 682 (10th Cir. 1988)(a teacher was allowed to litigate a claim of hiring discrimination that arose after she filed her EEOC charge contesting her rejection in a prior year, based on her allegation that the post-charge rejection was part of an ongoing pattern of discrimination encompassing rejections in ten consecutive years); *Price v. Cannon Mills*, 113 FRD 66 (MD NC 1986). The refusal to return Dailey to work in October, 1992 was merely a repeat of the same event already within the alleged continuing violation encompassed in his earlier charges and then pending lawsuit. Additionally, the Fifth Circuit has held

that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge because the District Court has ancillary jurisdiction. *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 284 (5th Cir. 1987); *Gupta v. East Texas State University*, 654 F.2d 411, 413 (5th Cir. 1981); *see also Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2nd Cir. 1980); *Nealon v. Stone*, 921 F.2d 584, 590 (4th Cir. 1992); *Malhortra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989). Not only was the second refusal to return Dailey to work like or reasonably related to the allegations in his earlier charge, but he had alleged they were retaliatory in the sense they grew out of the earlier charges. Under these circumstances there should have been no requirement whatsoever that Dailey file with the EEOC before pursuing his Title VII claims over the October, 1992 refusal to return him to work. As such, any finding by the lower courts that Dailey could not bring his Title VII claims of discrimination and retaliation over the October, 1992 incident because he failed to timely file an administrative charge with the EEOC was in error as a matter of law.

Respondent argues that Dailey's October, 1992 race discrimination and retaliation claim was a new and discrete act of discrimination requiring him to file an EEOC charge before bringing it in court. Opposition to Petition at 12. None of the cases cited by Respondent involved a case such as the instant case where the act of discrimination being considered had already been raised in a previous EEOC charge and was pending before the court when a second instance of the same act occurred. In those cases the instance of failure to rehire or reinstate was in fact a separate and distinct action rather then a repetition of the same act already raised in a charge and pending before the court as part of an alleged continuing pattern and practice. *See Ray v. Freeman*, 626 F.2d 439 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992), *aff'd*

35 F.3d 561 (5th Cir. 1994). In the instant case, Dailey was complaining about a second instance of refusal to return him to work, and as he has already pointed out, the District Court had ancillary power to hear a repeated instance of allegedly discriminatory and retaliatory conduct already being considered by him as part of a continuing violation allegation. *See Gottlieb; Gupta, Brown, Malhotra,* and *Nealon, supra.* As such, the dismissal of this claim because Dailey had failed to file an EEOC complaint over this specific incident was in error as a matter of law.

Even if Dailey is incorrect in his argument that his October, 1992 race discrimination and retaliation claims should not have been dismissed for his failure to file a timely charge with the EEOC, he has argued in the alternative, that his timely filing of a charge with the Department of Labor, which included not only claims under the Rehabilitation Act of 1973 but also claims of race discrimination and retaliation over the October, 1992 act, was sufficient and timely filing for Title VII purposes. When two agencies have concurrent jurisdiction over the respondent involved and the subject matter of the charge, the EEOC considers the charge filed as of the date of whichever charge was filed first. EEOC Decision No. 71-1115 (1971) CCH EEOC Dec. para. 6201. Additionally, when it is because of bureaucratic ineptitude that the EEOC did not receive a charge within the statutory time limits, but the Department of Labor did, the charge is deemed to have been timely filed by the EEOC. *EEOC v. Delaware Trust Co.*, 416 F.Supp. 1040, 1046 (DC Del. 1976). Dailey argued that it was the Department of Labor's fault if the EEOC was not timely notified he was claiming race discrimination and retaliation over the October, 1992 refusal to return him to work. According to the procedures which are supposed to be followed by the Department of Labor it is suppose to refer to the EEOC any charge filed under the ADA in its entirety whenever it includes allegations of discrimination of an individual nature on the basis of race

unless it also includes allegations of a violation of the affirmative action requirements under Section 503. 41 CFR Part 60-742.5(a)-(e). Even when an affirmative action violation is made, the Department of Labor is suppose to bifurcate the charges and refer the race issues to the EEOC. 41 C.F.R. Part 60-742(a)-(e). Since Dailey's claims as filed with the Department of Labor on November 12, 1992 did not include allegations that the affirmative action requirements of Section 503 had been violated and they did include individual allegations of race discrimination and retaliation over the October, 1992 incident, the Department of Labor was suppose to notify the EEOC that these charges had been filed and to refer all the claims in their entirety to the EEOC, but it did not do this. Instead it did nothing with the race discrimination and retaliation claims and investigated instead only Dailey's Section 503 and ADA claims. Thus, any failure to timely file with the EEOC was not Dailey's fault, but that of the Department of Labor by its failure to follow its own administrative rules and regulations requiring it to notify the EEOC, and should not be held against him. *See Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992). Whatismore, the pendency of proceedings in another federal agency will serve to toll the Title VII charge-filing time limit. *See Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 532 (SD Tex. 1972), *aff'd in part and revd in part*, 498 F.2d 641 (5th Cir) and *Egelston v. State University College*, 535 F.2d 752, 755, n. 4 (2nd Cir. 1976). The Department of Labor did not issue their notice of failure to conciliate on these charges until March 8, 1994. When Dailey was forced back to the EEOC to further conciliate his ADA claims over the same incident, the Department of Labor on Dailey's request finally referred the race discrimination claims to the EEOC and a right to sue letter was issued on both the ADA and Title VII claims arising out of the October, 1992 incident.

Thus, since Dailey did not have to file an EEOC charge alleging race discrimination and retaliation over the

October, 1992 refusal to return him to work, and if he did, he had done so by timely filing a charge with the Department of Labor raising the same claims, the District Court was in error as a matter of law in dismissing these claims from *Dailey I* and thereafter denying Dailey a jury trial in *Dailey I* on the ground that there were no post Civil Rights Act of 1991 claims before it. It can not be said the Fifth Circuit correctly affirmed the District Court's decision based upon its own precedent and precedent from other circuits, since the Fifth Circuit failed to cite any law whatsoever in support of its decision and failed to give any explanation as to why the law, including Fifth Circuit law, cited by Dailey was not applicable in the instant case. In fact the Fifth Circuit failed to address any of Dailey's arguments on appeal. The Fifth Circuit has affirmed a decision which is directly in conflict not only with its own law, but that of other circuits, and which has the end result of depriving Dailey of his constitutional right to a jury trial. Accordingly, there is a basis for this Court to assert its power of supervision.

2. The July, 1993 Layoff Claims

In the case of Dailey's July, 1993 Title VII and ADA claims, he had alleged that he was laid off simply to avoid having to return him to work in furtherance of the original discriminatory and retaliatory act of refusing to allow him to return to work and in retaliation for his haveing brought his previous EEOC and Department of Labor charges and pending litigation. Dailey contends the District Court's refusal to allow him to join these claims was in error as a matter of law since has already been argued a claim of retaliation growing out of a charge already pending before the Court need not be filed with the EEOC first. In that regard, the District Court's decision not to allow these charges in *Dailey I* was both in error as a matter of law, as well as, an abuse of descretion.

The July, 1993 layoff was instigated by the discriminating Mr. Skinner the same day the Department of

Labor ordered the Respondent to return him to work and to make him whole. This was on May 20, 1993. Dailey was notified on May 23, 1996 of the impending layoff. Although not aware of the exact timing of these events at the time of filing, Dailey was aware of the findings of the Department of Labor and its negotiations with Respondent, and relying on this timing and the evidence he had of earlier discrimination, Dailey immediately attempted to join these issues without leave of court on May 28, 1993; the last day to amend per the scheduling order. Realizing his error in filing without leave, Dailey sought leave to amend his complaint some 20 days later. This motion to amend was filed in early June, 1993 which was 15 days prior to the discovery deadline, more then six months before the scheduled trial date, a little over a month before the layoff would even become effective, and only 35 days after the decision to lay Dailey off had been made. There is absolutely no basis whatsoever for Respondent to argue Dailey's first motion seeking to join the 1993 layoff claims was untimely under these circumstances. If anything it was the District Court that was untimely in responding to the motion to amend since it did not rule on this motion until November 4, 1993. At that time it was determined that the claims were too remote in time[2] from the allegations currently involved in the case and that Dailey had failed to satisfy the administrative prerequisites of filing an EEOC charge over the layoff.

Dailey timely returned to the EEOC, filed his charge, obtained a right to sue letter, and returned to the District

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2 Dailey disputes the layoff is too remote from the claims then pending before the District Court especially when you consider the timing of the Department of Labor order to return him to work and the decision to lay him off. There was clearly a genuine issue as to whether the layoff was in any way related to his earlier charges of discrimination. Dailey has never argued that he was laid off out of seniority, but that the actual decision to lay him and those laid off with him was itself discriminatory and retaliatory.

Court with his second motion to amend which he filed one month before the scheduled trial. This second motion was also not untimely considering the circumstances under which it was filed. This motion was denied because it was determined the case was trial ready and to allow these new claims would be like filing a new case. The District Court concluded that if Dailey wished to pursue these claims they would have to be brought in a separate suit. So instead of it being like filing a new case, Dailey was in fact forced to file a separate suit. Dailey and his counsel are hard pressed to see any logic in this reasoning except to deprive him of any claim which would have entitled him to a jury trial in *Dailey I*.

Dailey contends the first motion to amend was denied in error as a matter of the law because as he had previously argued the repeat of an act of discrimination or retaliation in the course of a continuing pattern and practice of discrimination and retaliation already pending before the court does not require the filing of a separate EEOC charge. In denying the second motion to amend, the District Court abused its discretion since there was no evidence that Respondent would have been prejudiced if Dailey had been allowed to join these claims. *See Ashe v. Corley*, 992 F.2d 540, 542-43 (5th Cir. 1993). Prejudice means more then mere inconvenience or delay. There must be a showing that to allow the amendment would unfairly disadvantage or prejudice the non-moving party. *Cuffy v. Getty Refining and Markting Co.*, No. 84-761 MMS, 11/12/86 (D. Del.). The court in *Cuffy* held that, although a plaintiff's amendments were offered 13 months after the complaint, the fact that they required the defendant to conduct further discovery was not sufficient to show prejudice, and that the motion to amend was made after the defendant's motion for summary judgment did not require denying the plaintiff's motion without some showing of lack of diligence or bad faith on the part of the movant. There was no finding of either of these circumstances by the District Court in its orders denying

Dailey leave to amend as there is no evidence of either. In light of the Fifth Circuit decision in *Gottlieb*, *supra*, in which the Circuit Court reversed a lower court's denial of a post-trial motion to reopen the question of whether there had been retaliation despite the fact there had been no filing of an EEOC charge, it is difficult to see how the District Court in the instant case can be said not to have abused its discretion when Dailey attempted to join the claim initially back in June, 1993 and again in November, 1993 one month before trial. The simple fact that the trial might have had to have been postponed or that further discovery might have been needed by Respondent was not sufficient grounds for preventing Dailey from bringing a claim which he alleged was based on common facts to those already pending before the District Court and which did not even exist until a matter of days before he filed his first motion to amend.

In truth the only party prejudiced by the District Court's denial of Dailey's motions to amend his pleadings to include the 1993 layoff claims is Dailey himself. Respondent argues that he was not denied the opportunity to pursue his layoff claims, but was simply denied the opportunity to insert them in *Dailey I*. Opposition to Petition at 15. However, as argued below, Dailey was in fact denied his right to pursue his layoff claims since the District Court later dismissed them in *Dailey II* finding that the evidence he relied upon at trial in *Dailey I* was not sufficient to show discrimination and that there was no different evidence presented in support of the July, 1993 layoff that was different from that presented at trial. The problem with this is that the District Court tried *Dailey I* after finding there was a genuine dispute of facts as to whether the original refusal to return him to work was motivated by race or retaliation without a jury, and then applied his findings when deciding to dismiss the layoff claims subsequently brought in *Dailey II*. By so doing, the District Court deprived Dailey of a jury trial on all issues and facts common to both the claims brought in *Dailey I* and *Dailey II*

in violation of this Court's holding in *Lytle v. Household Manufacturing, Inc.*, 110 S.Ct. 1331 (1990). It is extremely important to note that the District Court did not find there was no evidence to support Dailey's layoff claims in *Dailey II*, or even that there was no disputed facts, as he was not ruling on a motion for summary judgment but a motion for sanctions. The District Court only held that there was no evidence which was different from that presented in *Dailey I* which the District Court had already concluded after a non-jury trial did not prove discrimination. Petition at 21a-22a, 26a-29a. A jury could have resolved those disputed facts differently, and if it believed Dailey was discriminated against back in October, 1990 then it could conclude together with the suspicious circumstances of the layoff itself, that it too was motivated by race discrimination and retaliation. Dailey was thus in truth denied any opportunity to have his layoff claims heard in either *Dailey I* or *Dailey II*.

Since the District Court's denial of Dailey's motions to amend and join his 1993 layoff issues in *Dailey I* were in error as a matter of law and were an abuse of discretion, the decision not to allow the 1993 layoff issues in *Dailey I* must be reversed. Since the District Court substituted its findings for those of a jury on this issue when deciding to dismiss these claims from *Dailey II* pursuant to a motion for sanctions, Dailey has been deprived of his opportunity to have the July, 1993 incident and the disputed facts on which he relied heard by a jury. This Court has clearly held in *Lytle, supra,* this is not to occur even it if means retrying issues which have already been tried by the Court because the waste of judicial resources is not to take precedence over a party's constitutional rights. This Court's supervision is required in order to remedy this deprivation of a constitutional right.

3. The October, 1992 ADA Claim.

It was not until November 9, 1993 that the District Court dismissed Dailey's already properly joined ADA claims over the October, 1992 refusal to return him to work. This

was a year after he had filed his EEOC and Department of Labor charges, a little more then six months since conciliation efforts with the Department of Labor had begun, a little more then two months since there had been any actual negotiations with the Department of Labor or the Respondent on this issue, and after Dailey had already attended mediation in *Dailey I*. Dailey has argued and Respondent does not dispute, that while Title VII and the ADA encourage conciliation, it is not a right of a defendant. *Gamble v. Birmingham S.R. Co.*, 514 F.2d 678, 688-9 (5th Cir. 1985)(regarding Title VII). Whatismore, if conciliation efforts between the EEOC or its agent, the Department of Labor, and an employer fails, or if 180 days pass without the Commission entering a conciliation agreement, the Commission must notify the charging party of the failure of conciliation and his right to bring suit. 42 U.S.C. Sec. 2000e-5(f)(1). There is no requirement that Dailey participate in conciliation efforts indefinitely in order for him to have been said to have exhausted his administrative prerequisites or to have cooperated in good faith. By the time the District Court dismissed Dailey's ADA October, 1992 claims in November, 1993 it was well over 180 days since he had filed his EEOC or Department of Labor charges and conciliation efforts had been going on without success for six months without the Department of Labor notifying Dailey of the failure of conciliation as regards the ADA claim. This is bad enough, but when you consider the issues being raised by Dailey went back as far as October, 1990, it was an injustice to have required him to continue to attempt conciliate with the Department of Labor and the EEOC anymore then he had already. *See Weise v. Syracuse University*, 522 F.2d 397, 412 (2nd Cir. 1975). Additionally, the entire time the Department of Labor was attempting conciliation of the 1973 Rehabilitation claim it was acting as EEOC's agent as regards the ADA claim. If it was resolved the matter could then have been dismissed. If it was not it could have been tried as part

of *Dailey I*. The District Court was in error in holding that unless Dailey continued to attempt still further conciliation he would be acting in bad faith. This was not the case and there is absolutely no evidence or law in support of this finding. Dailey had done everything he was required to so, i.e., he had filed a charge of discrimination, cooperated with the investigation, and obtained a right to sue letter. Even if he had not obtained a right to sue letter, he could have brought suit since it was more then 180 days since he had filed his charges with the Department of Labor and the EEOC and they had not been resolved. Whatismore, Dailey had every reason at that point to believe that any further conciliation efforts would not resolve this matter and such a belief together with the circumstances of this case clearly did not require him to pursue further conciliation. *See Nealon*, 958 F.2d at 590 (holding employee entitled to have retaliation claim heard by court since conciliation with employer did not improve her position the first time and would be unlikely to do so a second time); *see also, Weise*, *supra*. After all Dailey had been trying to get back to work since October, 1990, it was not until April, 1993 that the Department of Labor finally found in his favor on any point he had raised, and when they did he was not put back to work, but laid off. For Dailey to have expressed his belief and presented evidence in support of the fact that further conciliation efforts over the ADA claim would be futile was not the same as him having acted in bad faith as he was accused of by the District Court.

When the Department of Labor finally issued its notice of failure of conciliation on the ADA charge, instead of referring it to the EEOC, it deferred to the pending litigation since the EEOC had already issued a right to sue letter on the ADA issue. Dailey once again attempted to join the ADA claim in *Dailey I*, but was denied on December 17, 1993 because the Respondent's representative had represented to the District Court that the EEOC was willing to attempt further conciliation and because his lawsuit was too near to

trial. In fact the only reason the EEOC was willing to continue further conciliation was because Respondent's representative had informed them they had been ordered to do so by the District Court. The sole reason Respondent wanted to continue with what had already been unsuccessful negotiations over the ADA claim was to prevent Dailey from being able to have any of the facts underlying his race discrimination and retaliation claims heard by a jury. Respondent had no intention of making any further offers. When conciliation was scheduled with the EEOC Respondent failed to show up with the exception of a 10 minute telephonic appearance by Respondent's counsel who made no further offers other then what had been offered back in August, 1993.

The District Court in its November 9, 1993 order dismissing Dailey's October, 1992 ADA claim found that "because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined [Dailey's] ADA complaint, it would not have issued a right to sue notice." Petition at 8a. This was incorrect; however, because the only time this would have occurred would have been when the only claim raised by Dailey in his charge with the Department of Labor was that of disability discrimination. 41 C.F.R. Part 60-742.5(a)-(g). Since Dailey's charge as filed with the Department of Labor included individual claims of race discrimination and retaliation and did not involve any allegations of a violation of the affirmative action section of the Rehabilitation Act, the Department of Labor was suppose to refer everything, including the ADA claims to, the EEOC. 41 C.F.R. Part 60-742.5(a)-(g). Whatismore, although not necessary to these proceedings, Dailey discovered after appeal had been instigated through a delayed response to a freedom of information act request of the Department of Labor that the EEOC was fully aware of Dailey's dual-filed claims back in December, 1992 and had informed the Department of Labor that it would defer to them for 60 days after which time it

went ahead and issued its right to sue letter on the ADA issue. Appendix A. Dailey did nothing improper in this case. He did everything he was suppose to do. The EEOC, the Department of Labor, the Respondent, and the District Court, however, have not.

It was an abuse of discretion and error as a matter of law for the District Court to dismiss Dailey's October, 1992 ADA claims from *Dailey I* on the sole basis that Dailey was required to continue further conciliation efforts beyond what he had already participated in prior to the dismissal of his claims in November, 1993 since the Fifth Circuit law and the statutes pertaining to the handling of these charges clearly hold that Dailey could have filed his suit anytime after 180 days if conciliation was not successful, right to sue letter in hand or not, and that there is no right to conciliation in the Respondent. Again the failure to follow the law as relates to these claims has deprived Dailey of his constitutional right to a jury trial on all issues common to his equitable and legal claims.[3]

B. DAILEY WAS NEVER ALLOWED TO ASSERT HIS LEGAL CLAIMS AND THEY WOULD NOT HAVE BEEN DISMISSED ON SUMMARY JUDGMENT.

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3 Respondent would dispute this since it would argue that the District Court later dismissed this ADA claim pursuant to a motion for summary judgment and that it would not have been heard in *Dailey I* anyway. The District Court's basis for this decision was that Dailey was not disabled under the ADA. Dailey contends the District Court was in error. He would argue an employee with a documented herniated disk and resulting lifting restrictions, whose worker's compensation claim was upheld, who the Department of Labor found to have been disabled, and who was treated as though he could not do his job or any other for that matter by his employer when in fact he was fully capable of doing his job is clearly disabled. A Petition for Writ of Certiorari is being prepared on this issue at this time and will be filed shortly.

Dailey has shown that all of his claims were related to one another and were part of a continuing violation, and that the facts upon which he relied to prove his equitable claims were for the most part the same facts he relied upon to prove his legal claims. Dailey has also shown that the District Court was in error as a matter of law in not allowing Dailey to pursue any of his legal claims in *Dailey I*. By improperly dismissing his legal claims which were dependent on common facts to those supporting his equitable claims, trying his equitable claims, and then dismissing his legal claims brought in *Dailey II* and *Dailey III* on the grounds that they had already been decided in *Dailey I*, the District Court was in clear violation of this Court's holding in *Lytle*. But for the District Court's erroneous dismissal of all of Dailey's legal claims, Dailey would have been able to have a jury decide all facts common to both his legal and equitable claims in either *Dailey I, II* or *III*.

Respondent argues that *Lytle* is not applicable to the instant case, because the plaintiff in that case brought both a Title VII and a Sec. 1981 claim over a single event. The fact that Dailey's legal and equitable claims did not center around the exact same act of discrimination as they did in *Lytle*, but were part of an allegedly continuous pattern and practice claim including several separate acts, is irrelevant. The issue looked at in *Lytle* was whether the facts underlying both claims were the same, not whether the underlying allegedly discriminatory events were the same. A plaintiff may bring several different causes of action based on several different acts, but if they all are dependent to some extent on the determination of the same underlying disputed facts, then a court may not split them and try the equitable claims first and then apply the doctrines of res judicata or collateral estoppel to avoid a trial of the same facts over the legal claims. Dailey's claims surrounding his October, 1990 and October, 1992 incidents were both dependent on what his restrictions were, whether his restrictions prevented him from doing his

job, and whether his having participated in protected activities or his race had anything to do with the decisions not to allow him to work. In turn, whether or not Dailey was being discriminated or retaliated against at these times is relevant to whether he was still being retaliated or discriminated against in July, 1993.

Respondent next argues that since Dailey was allowed to pursue his dismissed claims in other suits, his constitutional right to a jury trial was not denied. This is a circular argument since Dailey's argument is that the District Court improperly applied the doctrines of res judicata and collateral estoppel to his other suits, *Dailey II* and *Dailey III*, thereby depriving him of any right to a jury trial even on his legal claims solely as a result of its improper dismissal of the claims from *Dailey I* and its improper decision to try the issues in *Dailey I* before Dailey's legal claims. *See Lytle, supra.* Dailey would not be complaining if he had been given the opportunity to try his legal claims in *Dailey II* and *Dailey III*. It is a fact the District Court applied its findings in *Dailey I* in deciding whether there was any evidence to support the claims in *Dailey II* and *Dailey III*. The District Court did not hold that Dailey could not pursue his claims in *Dailey II* and *Dailey III* because there were no genuine issues of fact, but simply that it had already decided any genuine issues of fact in *Dailey I* and that those facts in its opinion did not prove discrimination had occurred. Petition 21a-29a. By doing so Dailey was in fact and without question deprived of his right to a jury trial on his legal claims since the District Court should not have determined the facts underlying these claims. It is important to note that Dailey's legal claims, with the exception of the October, 1992 ADA claims were not dismissed as a result of a motion for summary judgment as alleged by Respondent, but while ruling on a motion for sanctions and because the District Court felt Dailey should have known the doctrines of res judicata and collateral estoppel would apply.

When Dailey was unable to bring his October, 1992 ADA claims and his July, 1993 layoff Title VII and ADA claims in *Dailey I*, he was forced to bring them in separate suits; *Dailey III* and *Dailey II*, respectively. The District Court specifically required this be done as these claims were dismissed without prejudice. Petition at 11a-12a; 18a-19a. When Dailey was required to separate these events from those set forth in *Dailey I*, he decided to include claims over these same events under 42 U.S.C. Sec. 1981. The District Court dismissed the 42 U.S.C. Sec. 1981 claims on the basis of res judicata holding that Dailey could have brought this cause of action in *Dailey I*. Dailey contends this is in fact possible; however, he is also entitled to bring all causes of action arising out of the same transaction in one suit. Since the District Court had already split Dailey's claims by requiring he bring his October, 1992 ADA and July, 1993 Title VII and ADA claims in subsequent suits he was entitled to bring his Sec. 1981 cause of action over the same events in those subsequent suits without fear of the doctrine of res judicata. It would make no sense to allow the 42 U.S.C. Sec. 1981 claims over these events in *Dailey I* while at the same time requiring the Title VII and ADA claims over the same incidents be brought in a separate suit.

Additionally, when the subject matter of a prior claim deals only with issues occurring prior in time to those brought in the second suit, the doctrine of res judicata should not apply. *Kavanaugh v. Sperry Univac*, 511 F. Supp. 705, 706 (ND Ill 1981), *aff'd without op*, 729 F.2d 1464 (7th Cir.), *cert denied*, 81 L.Ed.2d 370, 104 S.Ct. 2665. In the instant case the subject matter of *Dailey I* dealt with events which occurred prior in time to those brought in *Dailey II* and *Dailey III*. The actual events raised in *Dailey II*, and in *Dailey III* were not the same as those raised in *Dailey I*. Although Dailey argued that they were interconnected, part of a continuing violation, and were dependent on the same facts as those in *Dailey I*, they involved different separate acts on

the part of the Respondent occurring subsequent to those claims brought in *Dailey I*. The District Court was on the one hand arguing the claims were not related to one another and therefore required separate EEOC charges before they could be brought, and on the other hand arguing, they are related to one another and any causes of action arising out of the later events should have been brought in the first suit. Again the logic is lost on Dailey and his counsel.

CONCLUSION

The District Court was in error as a matter of law in failing to allow Dailey to bring any of his legal claims in *Dailey I* and then applying its findings of the disputed facts common to both his legal and equitable claims in order to dismiss his legal claims brought in subsequent suits. This was in direct violation of this Court's holding in *Lytle*. The District Court also improperly imposed sanctions based on its improper application of the doctrines of res judicata and collateral estoppel in violation of *Lytle*. The Fifth Circuit, although upholding the District Court's rulings, has not accused Dailey of bringing a frivilous appeal or set forth any reason why Dailey's arguments are invalid, but has simply chosen to ignore his arguments. As such, the violation of Dailey's constitutional rights have gone unchecked. The deprivation of a constitutional right and the failure of the lower courts to follow the law require this Court to apply its powers of supervision in order to prevent an injustice from occurring. The only remedy adequate to cure the deprivation of Dailey's constitutional rights is to reverse all the decisions complained of, to remand the entire case for trial before a jury, and to set aside the sanctions.

Respectfully submitted,

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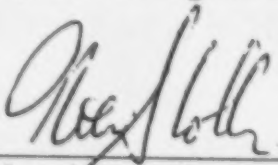
CERTIFICATE OF SERVICE

This is to certify that a three true and correct copies of the foregoing documents was mailed to opposing counsel, Maureen Moore, on October 31, 1996 via regular U. S. mail.



Noemi A. Collie, Esq.

APPENDIX A

CHRONOLOGY LOG

NAME & ADDRESS OF
CONTRACTOR/COMPLAINANT
Ollie Dailey v. Vought Aircraft Company
P.O. Box 655907 Dallas 75265-5907
NAME OF CHIEF EXECUTIVE OFFICER & PHONE NUMBER
NAME OF EEO COORDINATOR & PHONE NUMBER
Gil Barfield

Date: 12-2-92 Person Contacted: G. Barfield
Summary of Discussion or Action: Requested information from company to investigage complaint
EOS Name (Printed): Nash
Date: 12-9-92 Person Contacted: Nash
Summary of Discussion or Action: Recd co ltr 12/8/92 re charge filed w/EEOC
EOS Name (Printed): G. Barfield
Date: 12-17-92 Person Contacted: G. Barfield
Summary of Discussion or Action: Advised the charge will be held in abeyance 60d. pending OFFCP's investigation. EEOC requested to be part of any settlement agreement that is reached. (EEOC ltr 12/15/92)
EOS Name (Printed): Jacqualine R. Bradley, DD EEOC
Date: 12-17-92 Person Contacted: G. Barfield
Summary of Discussion or Action: He will send info as soon as they can put it together. See note to file.
EOS Name (Printed): Nash
Date: 12-24-92 Person Contacted:
Summar of Discussion or Action: assigned to co #147
EOS Name (Printed): [unintelligible]
Date: 1/26/93 Person Contacted:

Summary of Discussion or Action: Ext request to DD. Ext reqested to 3/3/0/93
EOS Name (Printed): M. Bouis
Date: 1/25/93 Person Contacted:
Summary of Discussion or Action: Rec'd 1/21/93 ltr from contractor - position paper - w/atty.
EOS Name (Printed): M. Bouis
Date: 2/3/93 2/23/93 Person Contacted: TRC
Summary of Discussion or Action: See memo/record. See [unintelligible] record
EOS Name (Printed):
Date: 2/25/93 Person Contacted:
Summary of Discussion or Action: Recd [unitelligible] EEOC - Notice to Sue - ADA
EOS Name (Printed):
Date: 2/26/93 Person Contacted: [unitelligible]
Summary of Discussion or Action: See [unintelligible]
EOS Name (Printed):
Date: 3/1/93 Person Contacted:
Summary of Discussion or Action: See [unintelligible] record
EOS Name (Printed):